

**STATE BOARD OF EQUALIZATION**

916/445-6493

February 27, 1984

Mr. M--- E---
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Dear Mr. E---:

Your letter of January 16, 1984 to Mr. Gary Jugum, Assistant Chief Counsel, has been referred to me for reply. You request our opinion as to the correct application of tax to the sale of "California Medical Diet Nutritional Weight Loss Plan."

The California Medical Diet ("CMD") is a nutritional preparation in powdered form to which water is added to make a liquid. Listed on the label from this product are the nutritional information per serving, the percentage of U.S. recommended daily allowances, (USRDA), and the ingredients. Each serving of this product provides the user with 154 calories, 11 grams of protein, 14 grams of carbohydrates, and 6 grams of fat. The maximum recommended dosage for this product (four servings per day) provides the user with a daily intake of 620 calories, 45 grams of protein, 156 grams of carbohydrates, and 24 grams of fat. The principal ingredients of CMD are milk derived proteins (Casein), fructose, and vegetable oils.

The recommended use of this product is stated on the label as follows:

"How to Use

"First Phase Rapid Weight Loss: Drink four (4) servings daily as your ONLY source of nutrition for periods not to exceed four consecutive weeks. Drink an additional six 8 oz. glasses of water daily.

"Second Phase Weight Stabilization: It is very important to progress through this Stabilization Phase after EACH four (4) weeks of Rapid Weight Loss (First Phase) or sooner if you have reached your ideal weight. See package insert for details.

“Third Phase Weight Maintenance: To keep your weight normal, after you have reached your ideal weight, replace one (1) or two (2) meals each day with the California Medical Diet.”

Apparently, the California Medical Diet was formulated by doctors after 19 years of clinical research at 28 California medical clinics involving over 33,000 patients, and is designed to help the user lose weight.

California Sales and Use Tax Law imposes a tax on the sale or use of tangible personal property in this state, provided the sale or use is not otherwise exempt from taxation. Section 6359 of the Revenue and Taxation Code exempts from tax the sale of and the storage, use, or other consumption in this state of “food products” for human consumption. Included within the definition of “food products” under Section 6359 are sugar, milk, milk products, and milk type beverages. Although a product for human consumption such as a milk based beverage may fall within a category that is generally exempt from sales and use tax, tax will apply to the sale of this product if (i) it is sold in either liquid, powdered, granular, tablet, capsule, lozenge, or pill form, and (ii) is sold as a dietary supplement (Section 6359).

Sales and Use Tax Regulation 1602 was promulgated to carry out the Legislature’s intent manifested by Section 6359. This regulation provides necessary guidelines to determine whether or not a particular food item is sold as a dietary supplement or adjunct. For the purpose of interpreting and applying the exception for dietary supplements, Regulation 1602(a)(5), provides, in relevant part, that the term “food products” does not include any product for human consumption “...in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such products (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake...”

Regulation 1602 also provides that tax does not apply to “...any such products which...are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and food providing adequate caloric intake. An example of the latter is a food daily providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the regulations of the Federal Food and Drug Administration...”

We are of the opinion that CMD does not qualify as a "food product," as that term is used in Regulation 1602 and Revenue and Taxation Code Section 6359 because it is sold as a dietary supplement. The CMD is a product in powdered form and is described on the label as a diet food which is prescribed or designed to decrease the user's caloric intake and encourage weight loss. Furthermore, this product does not provide the user with a sufficient amount of calories in the recommended daily dosage to qualify as a dietary food under Regulation 1602. Therefore, tax applies to the sale or use of this product.

If you have any further questions, please write this office.

Very truly yours,

Charles J. Graziano
Tax Counsel

CJG:ba